

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLSTATE INSURANCE COMPANY, *et*
al.,

Plaintiffs,

-against-

COUNTRYWIDE FINANCIAL CORP., *et*
al.,

Defendants.

10 Civ. 9591 (AKH)

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS**

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B. The Complaint Sufficiently Alleges That BofA Assumed Countrywide's Liabilities

The Complaint also sufficiently alleges that BofA impliedly and/or expressly assumed Countrywide's liabilities. Those allegations are sufficient to raise a claim for successor liability under the first of the four exceptions noted above. Though BofA goes outside the pleadings to challenge allegations regarding payments it made on Countrywide's behalf (Comp. ¶¶ 368-69), assumption of liabilities (just not, BofA claims, *these* liabilities) formed part of the "consideration" to which BofA repeatedly points. (*See* Rosenberg Dec. Ex. J at 8.01.) Further, the Complaint cites an article in which a BofA spokesperson expressly acknowledged that BofA had "bought all of [Countrywide's] assets *and liabilities*" and had factored in the "claims and potential claims" against the Company in making the purchase:

Handling all this litigation won't be cheap, even for Bank of America, the soon-to-be largest mortgage lender in the country. Nevertheless, the banking giant says that Countrywide's legal expenses were not overlooked during negotiations. "***We bought the company and all of its assets and liabilities,***" spokesman Scott Silvestri says. "***We are aware of the claims and potential claims against the company and have factored these into the purchase.***"

(Comp. ¶ 359.) BofA purchased Countrywide for *only* 27% of its book value at the time, further suggesting that the claims and potential claims against the Company were considered in making the purchase. (*Id.*) Then-BofA CEO and Chairman Kenneth D. Lewis has stated that he was aware of the "issues within the housing and mortgage industries" and said that "the transaction [with Countrywide] reflects those challenges." (*Id.* ¶ 362.) Similarly, Mr. Lewis said: "We did extensive due diligence . . . We looked at every aspect of the deal, *from their assets to potential lawsuits* and we think we have a price that is a good price." (*Id.* ¶ 361.)

BofA argues that "mere fact" of assumption of some debts cannot prove that BofA intended to pay all of Countrywide's debts. (BofA Memo. at 8.) But the question is not at this stage whether the act of paying certain liabilities *per se* obligates BofA to pay for all of them. It

is whether Allstate's alleged sufficient facts to make plausible Allstate's claim that BofA did so as to this liability.¹⁰⁸ Indeed, BofA's insistence that it has carefully distinguished what liabilities it did and did not assume only further evidences the need for discovery on these matters, and emphasizes BofA's intent to use these transactions to unfairly disadvantage certain classes of creditors.

CONCLUSION

For the reasons set forth above, this Court should deny the Defendants' motions to dismiss in their entirety.

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¹⁰⁸ BofA cites to *Fountain v. Colonial Chevrolet Co.*, No. 86C-JA-117, 1988 WL 40019, at *7-8 (Del. Super. Ct. Apr. 13, 1998), but that case was decided *on summary judgment*.